

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

REBEKAH SMITH; et al.

Civil No. 04-3057-CO

Plaintiffs,

FINDINGS AND RECOMMENDATION

v.

UBS FINANCIAL SERVICES, INC.,

Defendant.

COONEY, Magistrate Judge:

Plaintiff filed a notice of dismissal of plaintiff Delores Vasquez, pursuant to Federal Rules of Civil Procedure 41, which the court deems to be a motion for voluntary dismissal (#66). Plaintiff Vasquez represents that she and defendant have resolved the matters between them and that defendant does not oppose the dismissal.

I. DISCUSSION

Federal Rules of Civil Procedure provides in pertinent part that, subject to certain limitations, an action may be dismissed without order of the court by filing a stipulation of dismissal signed by all parties who have appeared in the action. Fed. R. Civ. P. 41(a)(1)(ii). Further, after a defendant has filed an answer or motion for summary judgment, an action may be dismissed voluntarily at plaintiff's request only by order of the court and "upon such terms and conditions as the court deems

proper." Fed. R. Civ. P. 41(a)(2). In the Ninth Circuit, "Although costs and attorney fees are often imposed upon a plaintiff who is granted a voluntary dismissal under Fed.R.Civ.P. 41(a)(2), no circuit court has held that payment of the defendant's costs and attorney fees is a prerequisite to an order granting voluntary dismissal." Stevedoring Servs. of Am. v. Armilla Int'l B.V., 889 F.2d 919, 921 (9th Cir. 1989) (and cases cited). Here, plaintiff Vasquez requests that dismissal be with prejudice and without fees or costs to either party. Rule 41(a)(2) also provides that the action shall not be dismissed against the defendant's objection unless a counterclaim pleaded by defendant prior to service of the motion to dismiss, can remain pending for independent adjudication. Plaintiff Vasquez represents that the matters between her and defendant have been resolved and she requests that her claims "and any claims against her" be dismissed; she represents that defendant does not oppose this dismissal.

The court finds that, in the circumstances, this action should be dismissed as to any claims of plaintiff Vasquez against defendant and as to defendant's counterclaim against her, with prejudice and without costs and fees imposed.

II. RECOMMENDATION

For the foregoing reasons, the motion to dismiss plaintiff Delores Vasquez (#66), as to plaintiff Vasquez's claims against defendant and defendant's counterclaim against Vasquez, should be granted, with prejudice, and without fees and costs.

This recommendation is not an order that is immediately appealable to the Ninth Circuit Court of Appeals. Any notice of appeal pursuant to Rule 4(a)(1), Federal Rules of Appellate Procedure, should not be filed until entry of the district court's judgment or appealable order.

The parties shall have ten days from the date of service of a copy of this recommendation within

which to file specific written objections with the court. Thereafter, the parties have ten days within which to file a response to the objections. Failure to timely file objections to any factual determinations of the Magistrate Judge will be considered a waiver of a party's right to de novo consideration of the factual issues and will constitute a waiver of a party's right to appellate review of the findings of fact in an order or judgment entered pursuant to the Magistrate Judge's recommendation.

DATED this 3 day of January, 2006.

/s/ _____
UNITED STATES MAGISTRATE JUDGE